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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MACKENZIE A., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. RONALD A. et al., Defendants and Appellants.	G028862 (Super. Ct. No. DP000084) O P I N I O N

Appeal from an order of the Superior Court of Orange County, John L. Flynn, Judge. Affirmed.

Stephanie M. Davis, under appointment by the Court of Appeal, for Defendant and Appellant Ronald A.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant Crystal A.

Laurence M. Watson, County Counsel, and Della M. Welch, Deputy County Counsel, for Plaintiff and Respondent.

John L. Dodd, under appointment by the Court of Appeal, for the Minor.

Ronald A. and Crystal A. appeal from the order terminating their parental rights to their daughter Mackenzie. Crystal argues the juvenile court abused its discretion in denying her Welfare and Institutions Code section 388 petition,[1] and both parents claim the court erred in failing to find the minor would benefit by preserving the parental relationship (§ 366.26, subd. (c)(1)(A)). Neither contention has merit and we affirm.

* * *

Mackenzie, born with a positive toxicology screen for opiates, was temporarily detained in December 1998, when she was only one day old. Two days later, the Orange County Social Services Agency (SSA) filed a section 300 petition alleging she was at a substantial risk of physical harm as a result of Crystal's use of controlled substances and Ronald "knew or reasonably should have known of the minor's mother's substance abuse [during her pregnancy] and failed to protect the minor from same." (§ 300, subd. (b).) Complicating matters further, Mackenzie suffered nerve damage to her right arm at birth, a condition known as "Erb's palsy."

In a report prepared for the December 21 detention hearing, the social worker noted both parents had lengthy criminal records involving substance abuse and domestic violence issues. But a physician opined the positive screen could have been "caused by medications administered to the minor's mother at the time of delivery, which included codeine." The court ordered SSA to prepare a case plan and released Mackenzie to her parents under SSA's supervision. A short time later, the court dismissed the petition without prejudice.

Approximately eight months later, Anaheim police officers responding to a disturbance call at Ronald's residence found Mackenzie in the care of two adult roommates, a suicidal schizophrenic (Linda) and a registered sex offender (Timothy) then under the influence of methamphetamine. Ronald had invited this dubious duo to help him care for

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[1] All further statutory references are to the Welfare and Institutions Code.

Mackenzie after Crystal was incarcerated on a drug possession charge. At the time of the altercation, Timothy and Linda had been living in the home for at least two months. Unable to locate an appropriate caretaker, the officers transported Mackenzie to the Orangewood Children's Home. SSA filed a new section 300 petition, alleging a substantial danger to the child's physical health. (§ 300, subd. (b).)

In his own defense, Ronald claimed he left Mackenzie to attend a party at 11:00 p.m. and "the child was not left in a dangerous situation at that time." He thought Timothy's drug use "'must have been a one time thing'" and Linda had not taken her psychiatric medication that evening. But Linda had already advised the investigating officers that Timothy had verbally assaulted her and he had not slept in three days because of his drug use. Timothy admitted smoking $80 worth of methamphetamine that evening. He was found in an "extremely agitated state," placed in wrist restraints, and transported to a mental health care facility.

At the August 1999 detention hearing, Ronald and Crystal denied the allegations in the petition. The juvenile court found there was "a substantial danger to the physical health of minor and there are no reasonable means by which the minor's physical or emotional health may be protected without removing the minor from the parent's [*sic*] physical custody." The court ordered random drug testing twice per week for each parent. Crystal and Ronald were allowed unmonitored visitation at Orangewood Children's Home, but monitors were required if the visits occurred elsewhere.

Neither parent put up much of a fight at the jurisdictional hearing. Ronald submitted on the reports and Crystal pleaded no contest. The social worker's report noted Ronald's failure to cooperate with drug testing and visit his daughter. Crystal had missed at least seven of Mackenzie's physical therapy appointments and Ronald attended only one of these sessions. For all she had been through, MacKenzie was still ahead of her parents. She was described as in "general good physical condition," "developmentally appropriate for her age," and "emotionally well grounded." Despite the troubled past and current behavior

of both parents, SSA still felt the prognosis for family reunification was "good" if the parents followed their case plans, including counseling for domestic violence, anger management, substance abuse, and parenting classes. The court sustained the allegations of the petition and removed Mackenzie from her parents' custody.

In a supplemental report, the social worker noted Mackenzie was thriving with her foster parents. Crystal, released from jail on October 13, 1999, was living with Ronald, but neither provided evidence of satisfactory drug testing. Similarly, there was no evidence either parent had participated in any of the court-ordered classes or counseling services. A second supplemental report was filed after Crystal was arrested on October 31, 1999, for being under the influence of drugs. Still on probation, Crystal had managed to stay out of trouble for a grand total of 17 days at the time of her arrest.

At the contested dispositional hearing, Crystal signed a stipulation that Mackenzie was a dependent of the juvenile court, reasonable efforts had been made to prevent the need for her removal from the home, and it would be detrimental to place Mackenzie with her parents. The stipulation also approved the previous visitation plan. Ronald submitted on the social worker's reports. The matter was continued to the six-month review.

Unfortunately, little had changed by the time of the next hearing. The social worker reported a return of Mackenzie to her parents would create a substantial risk of detriment, recommended reasonable services be provided, and requested the matter be continued to the 12-month review. Crystal was living at the Cooper Fellowship, a residential recovery center, as a condition of her parole, and participating in counseling. She was separated from Ronald, who was living in a motel and working.

Crystal's case plan required her to consult an SSA-approved therapist for drug abuse, self-esteem, anger management, and victimization issues. She was also to complete a parenting class and abstain from the use of drugs or alcohol. Ronald's plan included many of the same requirements. The social worker noted Crystal's release from custody on

March 28, 2000, and the need to show further progress in alleviating the problems requiring court involvement. Ronald had failed to comply with his plan or follow up on drug testing. Meanwhile, Mackenzie was "doing well and making significant developmental gains while in the care of her current caretakers." The court continued the matter a few weeks for further proceedings.

On the continued hearing date, the social worker recommended that the court terminate reunification services and set a permanency planning hearing. (§ 366.26.) Crystal had missed drug tests, failed to obtain appropriate counseling, and missed one of Mackenzie's physical therapy sessions. She had not contacted the perinatal program and would likely be terminated. Worse yet, Crystal tested positive for methamphetamine and was removed from the Cooper Fellowship program just one day after the last hearing. Crystal did check into a "spiritually based" self-help recovery program but did not bother to inform her parole officer of these developments, thus violating her parole. Mackenzie continued to prosper with her caretakers.

In a supplemental report filed on June 8, the social worker noted Ronald was not drug testing or working on any aspect of his case plan. Crystal had been asked to leave her new drug treatment facility on May 30, because she missed a mandatory meeting and failed to obtain employment. The other shoe dropped on May 31, when Crystal was arrested for a parole violation and transported to the California Institute for Women in Chino. Fresh puncture marks were found on her arms. In sum, Ronald showed no intention of participating in any of the court-ordered reunification services, and Crystal was unable to maintain a sober lifestyle.

Crystal declined to appear at a hearing on August 1, 2000, because "she did not want to lose the time served for transportation and waiting at Orange County Jail." Mackenzie's maternal grandparents advised the social worker they believed the foster parents were a better fit for adoption purposes. And the foster parents confirmed they were willing to adopt Mackenzie. Ronald, now unemployed after a near fight with his boss over

wages, insisted he should not have to do anything special to regain custody of his daughter. He completed two drug tests, but one was deemed irregular because the specimen was extremely diluted. The social worker noted Ronald never set any boundaries for Mackenzie during their visits and always looked to her caretaker for assistance. Ten days later, the parents stipulated continued supervision was necessary and a return of custody would create a substantial risk of detriment to the child. They also acknowledged Mackenzie would likely be placed for adoption in December 2000. The court found that reasonable services had been provided, terminated any further services, and set a permanency planning hearing. (§§ 366.21, subd. (e), 366.26.)

Crystal was released on parole on September 8, 2000. During her incarceration, she discovered she was pregnant. At a hearing on December 18, 2000, Crystal advised the court she drug tested regularly in prison and was attempting to remain sober. At her request, the court continued the hearing to January 2001 to allow her time to prepare a section 388 petition.

As promised, Crystal filed a petition for modification, alleging a substantial change in circumstances during the term of her incarceration. Crystal claimed she decided to turn her life around when she learned she was pregnant on August 15, 2000. She had maintained a stable lifestyle since her release from prison on September 8, 2000, and was now able to provide care for Mackenzie. Crystal found employment, made arrangements to live in a facility allowing children, and tested clean on a regular basis.

At the modification hearing, Mackenzie's foster mother testified, via speaker phone, that Crystal, under a monitor's watch, visited Mackenzie one hour each week. Mackenzie would approach her for assistance during these meetings, and not Crystal. Mackenzie had bonded with her foster family and they wished to adopt her.

Social worker Catherine Godkins had been assigned to this case since November 1999. Based on her knowledge of and experience with the family, she recommended the court deny further reunification services. Godkins explained Crystal had

not drug tested as ordered and confirmed that Mackenzie, during Crystal's visits, would turn to her foster mother if she needed anything. Crystal's attorney argued that Crystal had found a job and was on the road to recovery. County counsel noted Crystal's failure to participate in the programs and counseling the court had ordered.

The court denied the petition, describing Crystal's progress as "too little and too late." In short, Crystal never dealt with the core issues causing her inability to care for Mackenzie. She had several chances, but did not complete the assigned elements of her case plan. The court concluded it was in Mackenzie's best interests to remain with her foster parents.

The parties stipulated the testimony from the section 388 hearing could be considered by the court at the 366.26 hearing. Ronald testified he lived with Mackenzie until she was eight months old. Crystal spent the last two months of that period in jail. He claimed he visited Mackenzie on a weekly basis, but admitted missing four or five such visits. Even though their interaction was monitored, Ronald enjoyed playing games and running around with his daughter. He admitted his disinterest in his case plan and his failure to report for drug testing. Ronald apparently resented the juvenile court's intervention, but at one point acknowledged he would have regained custody if he had complied with the requirements of his case plan. His employer testified he trusted Ronald in spite of his past and never saw him use drugs at work.

The court noted neither parent had completed "any significant components of the court-ordered family reunification service plan." Ronald never came to grips with the elements or events necessitating judicial intervention and ignored the case plan ordered by the court. Mackenzie had lived with her foster parents for the past 15 months, joining the family when she was just under one year old. The foster parents provided excellent care, had bonded with Mackenzie, and expressed a desire to adopt her. Concluding adoption was now the most appropriate option and the section 366.26, subdivision (c)(1)(A) exception did not apply, the court terminated parental rights.

I

Crystal complains the juvenile court abused its discretion in denying her section 388 petition. Claiming "[s]tate prison had changed her" and she "showed no signs of relapse," Crystal argued it was in her daughter's best interests to extend reunification services and "remain in her foster placement."

To prevail, Crystal was required to show both a change of circumstances *and* that the proposed change was in the child's best interests. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) Once services were terminated and the court set the section 366.26 hearing, Crystal's interest in reunification took a backseat to Mackenzie's need for permanency and stability. Suffice it to say, Crystal had received more than ample opportunity to reunify with her daughter. At this stage of the game, the court had to presume the adoption scenario was in Mackenzie's best interests. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308-310.)

Crystal was incarcerated when SSA filed the second section 300 petition. She was released from custody — on a subsequent parole violation — in time to file a section 388 petition. She was battling a drug addiction at the time Mackenzie was removed from her home. She did present some evidence of change at the modification hearing. There, she claimed she was successfully parenting her newborn child, had obtained housing, and had managed to remain sober for a few months. In that respect, at least, some circumstances had, in fact, changed.

Crystal complains the "juvenile court failed to properly assess the remarkable progress in rehabilitation [she] had achieved." There was, of course, more to this story than met the eye. Crystal never completed the tasks outlined in her case plan. Her failure to do so was one critical measure of her success in dealing with her problems. Again, it was up to Crystal to demonstrate that circumstances had changed. Reunification services are designed to do more than merely inconvenience parents. The programs and counseling ordered by the court were calculated to help Crystal counter her long history of

drug abuse and criminal activity. Given Crystal's pattern of relapsing into substance abuse after pregnancy, the court was entitled to consider her success — or lack thereof — in dealing with the circumstances causing her past drug addiction. In this instance, at least, it appeared there was little, if any, real change. Accordingly, we cannot say the court abused its discretion in concluding Crystal was only starting to make progress in dealing with the problems necessitating court intervention, and had not yet progressed to the point that she could provide stable care for Mackenzie.

That is not the end of our inquiry, however. Crystal also failed to provide any evidence to show the requested modification would be in Mackenzie's best interests. Her personal history was dotted by brief periods of sobriety during her pregnancies, followed by immediate relapses into drug abuse and crime. Her inability to deal with her substance abuse problem and her repeated incarcerations prevented her from playing any meaningful part in Mackenzie's life. At the time of the modification hearing, Crystal had remained clean for only a few months, even though she had been addicted to drugs for over 15 years. As the social worker explained, Crystal's frequent absences weakened whatever bond did exist with her daughter. In the interim, Mackenzie had bonded with her foster parents and turned to them for her needs.

At best, Crystal's initial progress toward rehabilitation was a positive sign, but there was substantial evidence to show the problems necessitating placement remained unresolved and she was not yet ready to parent this child. The juvenile court properly exercised its discretion in finding that Mackenzie's best interests would be served by denying the modification Crystal requested. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 326.)

II

Both parents claim the court erred in terminating their parental rights because the so-called "benefit exception" should have been found to apply here. (§ 366.26, subd.

(c)(1)(A).) Reviewing the claim under the appropriate substantial evidence standard, we must disagree. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

To qualify for this exception, Crystal and Ronald needed to show they maintained regular visitation with their daughter and that she would benefit from the continuation of that relationship. From time to time, both parents visited Mackenzie on at least a semi-regular basis. But their efforts were sporadic at best. The evidence also showed both parents failed to take responsibility for Mackenzie during these visits and routinely looked to the foster parents for assistance. Neither parent could show that they occupied a parental role or that there existed a "'significant, positive, emotional attachment from child to parent.'" (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.) In the end, the court concluded this was not the type of relationship that would outweigh the security and sense of belonging a new family would confer on Mackenzie. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 821.)

Putting aside Ronald and Crystal's modest relationship with their daughter, substantial evidence supports the decision that she would not benefit from continuing contact with either parent. (E.g., *In re Rikki D.* (1991) 227 Cal.App.3d 1624, 1632.) The juvenile court's decision was based on a consideration of all the evidence. We are in no position to say that decision was the wrong one, or that Mackenzie would be "greatly harmed" (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575) by termination so as to overcome the adoption preference. In fact, we are of the opinion the court could not have ruled any other way.

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.